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Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up to and implementation of the Durban Declaration and Programme of Action

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, E. Tendayi Achiume, prepared pursuant to Council resolution 34/35. The report addresses the issue of racial discrimination in the context of laws, policies and practices concerning citizenship, nationality and immigration.

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I. Activities of the Special Rapporteur

1. The present report is submitted pursuant to Council resolution 34/35.

A. Country visits

2. Following her appointment, the Special Rapporteur renewed the formal requests for country visits sent by her predecessors to Algeria, Bangladesh, Botswana, India, Israel, Japan, Malaysia, South Africa and Tunisia. She also sent requests to Colombia, the Dominican Republic, Jamaica, Kenya, Lebanon, Madagascar, Oman, Peru and Trinidad and Tobago. She urges States that have not yet responded positively to her visit requests to do so.

3. The Special Rapporteur thanks the Government of the United Kingdom of Great Britain and Northern Ireland for inviting her to conduct a visit from 30 April to 11 May 2018. She also thanks the Governments of Brazil, Morocco, the Netherlands, Poland and Qatar for accepting her visit requests.

B. Other activities

4. In November 2017, the Special Rapporteur delivered a video statement at the regional meeting for Europe, Central Asia and North America on the International Decade for People of African Descent. On 22 February 2018, she participated in the annual parliamentary hearing of the Inter-Parliamentary Union, entitled "Towards a global compact for safe, orderly and regular migration: A parliamentary perspective". In March 2018, she attended the 167th session of the Inter-American Commission on Human Rights in Bogotá, during which she engaged with local civil society organizations. During the twenty-second session of the Working Group of Experts on People of African Descent, from 19 to 23 March 2018, she delivered a video statement on land rights for people of African descent.

5. On 20 March 2018, the Special Rapporteur was a keynote speaker at the commemorative plenary meeting of the General Assembly in New York on the occasion of the International Day for the Elimination of Racial Discrimination. On the same day, she participated in the official launch of the Group of Friends on the Elimination of Racism. On 21 March 2018, she participated in a special event celebrating the International Decade for People of African Descent, entitled "A decade of recognition for the contributions, achievements and challenges of people of African descent worldwide". While in New York, she held an informal consultation with local civil society organizations and other interested stakeholders. Participants discussed setting an international human rights anti-racism agenda in the shadow of populist nationalism.

II. Racial discrimination in the context of citizenship, nationality and immigration status

6. The present report identifies and reviews contemporary racist and xenophobic ideologies, and institutionalized laws, policies and practices, which together have a racially discriminatory effect on individuals' and groups' access to citizenship, nationality and immigration status. It shows how both are prohibited under international human rights law and recommends concrete actions States must take to fulfil their obligations to achieve substantive racial equality. It highlights the impact of ethno-nationalism, and draws attention to how ethno-nationalists and other groups manipulate national anxieties about national security and economic prosperity to achieve and advance racist and xenophobic policies against indigenous peoples, non-nationals and other minority groups. In doing so, it calls attention both to explicit ideologies of racial superiority and to structural racism that occurs through institutions and policies that might otherwise be ignored due to the absence of explicit racial, ethnic or religious animus. To inform the drafting of the present report, the Special Rapporteur issued a call for submissions to the various stakeholders of her mandate. She received and reviewed 25 submissions from Member States and 13 submissions from civil society organizations. She welcomes these submissions and encourages wider

participation of Member States, civil society organizations and other stakeholders in her future reports.

7. Under international human rights law and principles, all human beings are entitled to fundamental human rights on account of their inherent dignity. The preamble to the Universal Declaration of Human Rights begins with the proclamation that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. In reality, however, for all human beings, their capacity to enjoy full human rights depends on their citizenship, nationality or immigration status. Everywhere, States require passports, identification cards and other forms of proof of citizenship in order for residents to enjoy access to health care, education, financial services and to maintain formal employment. In short, citizenship, nationality and immigration status remain preconditions for full enjoyment of human rights for people everywhere.

8. Although the exact number of stateless persons is unknown, the Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that there are approximately 10 million stateless persons across the globe.[1] The dire circumstances confronting stateless persons make clear the vital role that citizenship and nationality play in determining access to fundamental human rights. Owing to their lack of documentation, individuals who are stateless face grave and often insurmountable barriers in access to employment, education, health care, birth registration, property ownership, freedom of movement and political participation.[2] Stateless persons also face greater risks of human trafficking victimhood and other forms of exploitation.[3] In general, stateless individuals live lives of constant fear of arrest, detention and even physical expulsion because they lack official documents. Children constitute over a third of the global stateless population, and in the countries with the 20 largest stateless populations, approximately 70,000 stateless children are born each year.[4]

9. Owing to their immigration status, other categories of non-citizens are also subject to serious human rights violations, including unlawful involuntary physical expulsion in violation of the non-refoulement principle under international refugee law and international human rights law. From formally recognized refugees to regular and irregular migrants, many are denied access to education, health care, employment and even equality before the law. Barriers to formal documentation can mean entire generations of refugee children are excluded from formal education. For example, 54 per cent of South Sudanese refugee children are out of school,[5] as are over half a million Syrian refugee children.[6] More generally, about only half of the global child refugee population has access to primary education as compared to the global non-refugee child average of 90 per cent. As refugee children get older, their educational opportunities only worsen: whereas the global average of adolescent secondary school attendees is 84 per cent, for refugee children this proportion plummets to 22 per cent enrolment in secondary school.[7]

10. It simply remains the case that, notwithstanding the entitlement that every human being has to fundamental human rights, the lived experience of most is that it is citizenship, nationality and immigration status that effectively determine the ability to exercise and enjoy

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[1] UNHCR, "The Sustainable Development Goals and addressing statelessness", March 2017, p. 2. Available at www.refworld.org/docid/58b6e3364.html.

[2] See UNHCR, "This is our home: stateless minorities and their search for citizenship", November 2017. Available at www.refworld.org/docid/59e4a6534.html.

[3] UNHCR and Open Society Justice Initiative, "Citizens of nowhere: solutions for the stateless in the U.S.", December 2012, p. 10. Available at www.refworld.org/docid/50c620f62.html.

[4] UNHCR, "I am here, I belong: the urgent need to end childhood statelessness", November 2015, p. 8. Available at www.unhcr.org/ibelong/wp-content/uploads/2015-10-StatelessReport_ENG15-web.pdf.

[5] See UNHCR, "The plight of South Sudanese refugee children—reflections of the Regional Refugee Coordinator", 20 September 2017. Available at www.unhcr.org/afr/news/stories/2017/9/59c246674/the-plight-of-south-sudanese-refugee-children-reflections-of-the-regional.html.

[6] UNHCR, "Syria crisis: education interrupted", December 2013, p. 5. Available at www.unhcr.org/en-us/publications/operations/52aaebff9/syria-crisis-education-interrupted.html.

[7] UNHCR, "Missing out: refugee education in crisis", September 2016, p. 4. Available at www.unhcr.org/57d9d01d0.

these rights. Some are denied citizenship or formal immigration status at birth or through restrictions on naturalization, while others are subject to collective and individualized withdrawals of citizenship. Sometimes, States produce stateless populations or persons with irregular or inadequate status through administrative barriers that structurally exclude marginalized social or national groups.[8] They use policies and laws that range from outright denial of citizenship to heightened inaccessibility of complicated immigration systems. In either case, the impacts of these direct and indirect mechanisms of exclusion and discrimination are similarly devastating.

11. A State discriminatorily deprives a person of citizenship or immigration status when it withholds or withdraws status on an unreasonable classification such as skin colour, ethnicity, national origin or religion. States have long used access to citizenship and immigration status as a discriminatory tool to curtail the rights and benefits of marginalized groups. Statelessness, for example, has a number of causes, but it is often the result of long-standing discrimination against racial and ethnic minorities, indigenous peoples and religious groups. In other words, it is often the foreseeable product of discriminatory laws, policies and practices that aim to exclude or have the effect of excluding people who are considered as foreign, often on the basis of their race, colour, descent, ethnicity, national origin or religion.[9] It is thus no surprise that according to UNHCR, "more than 75% of the world's known stateless populations belong to minority groups".[10] Although some States have renounced explicit discriminatory practices and have adopted fairer-seeming laws and policies, many States continue to permit institutional or indirect discrimination based on race, colour, ethnicity and religion. Similarly, exclusion from citizenship status or from all forms of formal immigration status typically occurs along racial, ethnic, national origin and religious lines, as discussed below.

12. Also discussed below is the importance of an intersectional approach to racial discrimination in the context of citizenship, nationality and immigration laws that accounts for the compounding and differential effects of sex and gender, among other factors. States continue to enforce patriarchal laws that use gender-based discrimination to achieve racial, ethnic and religious exclusion.

13. The present report is organized as follows: section III provides an overview of the applicable international human rights framework. Section IV examines several contemporary manifestations and drivers of racial discrimination in the context of citizenship, nationality and immigration laws, policies and practices. The current section notes that the past decade has seen the escalation of racially discriminatory policies and rhetoric concerning citizenship, nationality and immigration status all over the world. In the past three years in particular, ideologies of racist and xenophobic hatred have been resurgent. As mentioned above, the first aim of the present report is to name and analyse the human rights impact of these ideologies on specific racial, ethnic, national and religious groups. The Special Rapporteur underscores the urgent need for States to condemn explicitly racist and xenophobic practices and policies where citizenship, nationality and immigration laws are concerned.

14. At the same time, the Special Rapporteur aims in the present report to highlight and condemn facially race-neutral policies or rhetoric that nonetheless result in racialized exclusion. This is because States regularly engage in racial discrimination in access to citizenship, nationality or immigration status through policies and rhetoric that make no reference to race, ethnicity or national origin, and that are wrongly presumed to apply equally to all. The Special Rapporteur thus uses the present report to identify and analyse structures and discourses that have the effect of racially discriminating against individuals and groups in their access to citizenship and immigration status, even when States, politicians and general populations ignore or deny the racial impact of these structures and discourses. There

[8] This is particularly the case in situations of protracted or large-scale displacement. See, for example, Institute on Statelessness and Inclusion and Norwegian Refugee Council, "Understanding statelessness in the Syria refugee context", 2016. Available at www.nrc.no/resources/reports/understanding-statelessness-in-the-syria-refugee-context/.

[9] UNHCR finds that "discrimination and exclusion of ethnic, religious or linguistic minority groups often lies at the heart of their statelessness". See UNHCR, "This is our home", p. 2.

[10] Ibid., p. 1.

is no question that achieving racial equality requires robust action to deal swiftly and simultaneously with explicit racism and xenophobia, and with policies and institutions that achieve racial and xenophobic discrimination, even absent discernible racial or xenophobic animus.

15. Section V concludes the report with recommendations for various stakeholders, outlining necessary actions to promote substantive equality.

III. Prohibition of racial discrimination on the basis of citizenship, nationality and immigration status under international human rights law

A. Overview of the applicable international legal framework

16. The Special Rapporteur recalls that international human rights law is based on the premise that all persons, by virtue of their humanity, should enjoy all human rights without discrimination on any grounds. The principles of equality and non-discrimination are therefore codified in all core human rights treaties.[11] The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have frequently reiterated that the rights set out in the two International Covenants on Human Rights must generally be guaranteed to everyone, including non-citizens and persons belonging to racial and ethnic minorities.[12] Exceptional distinctions, for example between citizens and non-citizens or between different groups of non-citizens, are permissible only if they serve a legitimate objective and are proportional to the achievement of that objective. Differences in treatment on grounds of race or ethnicity are not permitted as the prohibition of racial discrimination has been recognized as part of customary international law, imposing immediate and absolute obligations from which no derogation is permitted, even in a state of emergency.[13]

17. The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of All Forms of Racial Discrimination. Article 1 (1) defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". While the provision does not mention discrimination on the basis of religion, the Committee on the Elimination of Racial Discrimination has found that the Convention may apply in cases where discrimination on religious grounds intersects with other forms of discrimination specifically prohibited under article 1 (1).[14]

18. The Special Rapporteur would like to highlight that the prohibition on racial discrimination in international human rights law aims at much more than a formal vision of equality. Equality in the international human rights framework is substantive, and requires States to take action to combat intentional or purposeful racial discrimination, as well as to combat de facto or unintentional racial discrimination. Indeed, in its general recommendation No. 32 (2009) on the meaning and scope of special measures in the Convention, the Committee on the Elimination of Racial Discrimination clarifies that the prohibition of racial discrimination under the Convention cannot be interpreted restrictively. It not only aims to

[11] For an overview of international human rights instruments that specifically prohibit discrimination against certain groups, see A/HRC/32/50, paras. 10–14. The report also provides an overview of the prohibition of racial discrimination at the regional level, paras. 15–25.

[12] See, for example, Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, paras. 1–2; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, paras. 24 and 30.

[13] See, for example, A/HRC/7/23, para. 35.

[14] See, for example, Committee on the Elimination of Racial Discrimination, general recommendation No. 32, para. 7; and *P.S.N. v. Denmark* (CERD/C/71/D/36/2006), para. 6.3.

achieve formal equality before the law, but also substantive (de facto) equality in the enjoyment and exercise of human rights. The Committee emphasizes that the Convention applies to purposive or intentional discrimination as well as discrimination in effect[15] and structural discrimination.[16]

19. The Special Rapporteur stresses that this substantive, non-formalistic approach to equality applies even in the context of citizenship, nationality and immigration laws and policies. Article 1 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination stipulates that the Convention does not apply to distinctions, exclusions, restrictions or preferences made between citizens and non-citizens. While this provision allows States to make some distinction between citizens and non-citizens, the Special Rapporteur reiterates that it must be interpreted narrowly and in accordance with international human rights law and standards relating to the prohibition of racial discrimination and equality before the law. Distinctions between citizens and non-citizens cannot be applied in a racially discriminatory manner or as a pretext for racial discrimination. In its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee explains that article 1 (2) must not undermine the general equality and non-discrimination provisions enshrined in article 5 of the Convention and other international legal instruments (paras. 2–3). The Committee elaborates further, indicating that differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim (para. 4). In order to eliminate and prevent racial discrimination against non-citizens, the Committee calls on States to ensure that domestic legislation on the prohibition of racial discrimination applies to non-citizens, regardless of their immigration status, and to ensure that the implementation of national legislation does not have a discriminatory effect on non-citizens (para. 7). In addition, the Committee urges States to protect the rights of non-citizens by adopting concrete measures with regard to hate speech and racial violence; access to citizenship; the administration of justice; expulsions and deportations; and the enjoyment of economic, social and cultural rights (sects. II–VII).

20. The prohibition of racial discrimination also applies in the context of deportations or expulsions of non-citizens. Although not explicitly mentioned in the Convention, the Committee has addressed racial discrimination in the context of deportations and expulsions in its general recommendations, jurisprudence and concluding observations. Deportations and expulsions threaten and can violate article 5 (b) of the Convention, which guarantees freedom from racial discrimination in enjoyment of the right to security of person and protection from violence or bodily harm.[17] In its general recommendation No. 30, the Committee lists concrete measures that States should adopt in this area. It calls on States to ensure that: (a) domestic legislation concerning deportations or other forms of removal do not discriminate, in purpose or effect, among non-citizens on the basis of race, colour, national or ethnic origin; (b) all non-citizens have equal access to effective remedies; (c) non-citizens are not subject to collective expulsion; (d) the principle of non-refoulement is respected; and (e) they avoid expulsions of non-citizens, especially long-term residents, that would result in disproportionate interference with their right to family life (paras. 25–28).

21. With regard to immigration, the Special Rapporteur notes that laws and policies on immigration must not discriminate, in purpose or effect, on the basis of race, colour, national or ethnic origin.[18] The Special Rapporteur is of the view that blanket immigration bans that target particular nationalities with the intent or effect of discriminating on the basis of race,

[15] See Committee on the Elimination of Racial Discrimination, general recommendation No. 32, paras. 6–7.

[16] See, for example, Committee on the Elimination of Racial Discrimination, general recommendation No. 34 (2011) on racial discrimination against people of African descent, paras. 5–7.

[17] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A commentary* (Oxford, Oxford University Press, 2016), pp. 325–326 and 339–340.

[18] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, art. 1 (3); Committee on the Elimination of Racial Discrimination, general recommendation No. 30, paras. 1, 7 and 9; Durban Declaration and Programme of Action, art. 30.

colour, national or ethnic origin are in clear violation of article 1 (3) of the Convention.[19] In particular, in the context of counter-terrorism, immigration and other measures must comply with the prohibition of racial discrimination, including with regard to racial and ethnic profiling or stereotyping.[20]

B. Right to nationality and the reduction/prevention of statelessness

22. While the prohibition of racial discrimination applies to the enjoyment of all civil, political, economic, social and cultural rights,[21] the Special Rapporteur notes that the right to nationality is particularly relevant in the context of citizenship, nationality and immigration.

23. Although the regulation of nationality is generally considered to be within the domestic jurisdiction of States, international law provides that the right of States to decide who their nationals are is not absolute.[22] The Inter-American Court of Human Rights noted that although "the determination of who has a right to be a national continues to fall within a State's domestic jurisdiction … its discretional authority in this regard is gradually being restricted with the evolution of international law".[23]

24. The right to a nationality is recognized and protected in various international[24] and regional[25] human rights instruments. It entails the right of each individual to acquire, change and retain a nationality.[26] In addition, the issue of nationality is regulated in the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons, and the Convention relating to the Status of Refugees. The Convention on the Reduction of Statelessness requires States to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals (arts. 1 and 4) and upon loss or deprivation of nationality (arts. 5–8). Under the Convention relating to the Status of Stateless Persons, States parties are also required to facilitate the assimilation and naturalization of stateless persons (art. 32).

25. Discrimination in the acquisition, transmission, change or deprivation of nationality is prohibited under the general equality and non-discrimination provisions of various instruments.[27] Some treaties also include specific provisions on the non-discriminatory enjoyment of the right to nationality. For example, article 5 (d) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination explicitly obliges States parties to guarantee the right of everyone to equality before the law, including in the enjoyment of the right to nationality. In its general recommendation No. 30, the Committee on the Elimination of Racial Discrimination calls upon States parties to ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization; to address barriers to naturalization for long-term and permanent residents; to

[19] See also *A.M.M. v. Switzerland* (CERD/C/84/D/50/2012), para. 4.11.

[20] See Committee on the Elimination of Racial Discrimination, general recommendation No. 30, para. 10.

[21] See International Convention on the Elimination of All Forms of Racial Discrimination, art. 5.

[22] See A/HRC/13/34, paras. 20 and 57.

[23] See *Yean and Bosico v. Dominican Republic*, Inter-American Court of Human Rights, judgment of 5 September 2005, series C, No. 130, para. 140.

[24] See Universal Declaration of Human Rights, art. 15; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (iii); International Covenant on Civil and Political Rights, art. 24 (3); Convention on the Elimination of All Forms of Discrimination against Women, art. 9; Convention on the Rights of the Child, arts. 7–8; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 29; Convention on the Rights of Persons with Disabilities, art. 18; Convention on the Nationality of Married Women, arts. 1–3; United Nations Declaration on the Rights of Indigenous Peoples, art. 6.

[25] See African Charter on the Rights and Welfare of the Child, art. 6; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 6; American Declaration on the Rights and Duties of Man, art. XIX; American Convention on Human Rights, art. 20; Arab Charter on Human Rights, art. 24; European Convention on Nationality, arts. 4–9; Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, arts. 2–11.

[26] See A/HRC/13/34, para. 21.

[27] Ibid., paras. 18 and 30–31.

take into account that denial of citizenship could result in a violation of the Convention if long-term or permanent citizens are disadvantaged in their access to employment and social benefits; to reduce statelessness; and to regularize the status of former citizens of predecessor States (paras. 13–17).[28] In addition, in its general recommendation No. 27 (2000) on discrimination against Roma, the Committee urges States parties to ensure that legislation regarding citizenship and naturalization does not discriminate against members of Roma communities (para. 4).

26. The right to retain a nationality entails a prohibition of the arbitrary deprivation of nationality,[29] which is implicitly or explicitly recognized in numerous international and regional instruments.[30] In its general recommendations, the Committee on the Elimination of Racial Discrimination has reiterated that the deprivation of citizenship on the basis of race, colour, descent or national or ethnic origin violates States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality.[31] Article 9 of the Convention on the Reduction of Statelessness provides that the deprivation of nationality on racial, ethnic, religious or political grounds is prohibited, even if it would not result in statelessness.

27. In the light of the above-mentioned standards, the Special Rapporteur concludes that citizenship, nationality, and immigration laws and policies constitute a violation of international human rights law when they discriminate, in purpose or effect, between citizens and non-citizens, or among non-citizens, on the basis of race, colour, descent, or national or ethnic origin. Law, policies and practices that disproportionately exclude or have a negative impact on a particular racial, ethnic or national group should also be considered as a breach of the prohibition of racial discrimination. This is true even in the absence of de jure or intentional discrimination.

28. The Special Rapporteur would like to highlight that States must not only refrain from racial discrimination, but also have an obligation to adopt preventive measures aimed at combating prejudice and promoting tolerance, understanding and inclusion.[32]

C. Importance of an intersectional approach to racial discrimination and related intolerance

29. Achieving substantive racial equality requires an intersectional analysis of the problem of racial discrimination and intolerance.[33] The following definition of intersectionality captures well its significance:

> The idea of "intersectionality" seeks to capture both the structural and dynamic consequences of the interaction between two or more forms of discrimination or systems of subordination. It specifically addresses the manner in which racism, patriarchy, economic disadvantages and other discriminatory systems contribute to create layers of inequality that structures the relative positions of women and men, races and other groups. Moreover, it addresses the way that specific acts and policies

[28] The Committee has frequently addressed these issues in its concluding observations. See, for example, CERD/C/KWT/CO/15-20, para. 17; CERD/C/ITA/CO/16-18, para. 24; CERD/C/MDV/CO/5-12, para. 10; CERD/C/CYP/CO/17-22, para. 18; CERD/C/EST/CO/8-9, para. 13; CERD/C/KHM/CO/8-13, para. 18; CERD/C/TKM/CO/6-7, para. 18; CERD/C/SRB/CO/1, para. 19.

[29] For an analysis of the term "arbitrary deprivation of nationality", see A/HRC/13/34, paras. 23–27. See also A/HRC/25/28, para. 22.

[30] See A/HRC/13/34, para. 26; and Human Rights Council resolution 32/5.

[31] See Committee on the Elimination of Racial Discrimination, general recommendations No. 30, para. 14, and No. 34, para. 48.

[32] See, for example, International Convention on the Elimination of All Forms of Racial Discrimination, arts. 2 (1) (e), 4 and 7; Durban Declaration and Programme of Action, inter alia, paras. 30 (a) and 132; Committee on the Elimination of Racial Discrimination, general recommendation No. 30, paras. 11–12.

[33] See Committee on the Elimination of Racial Discrimination, general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination.

> create burdens that flow along these intersecting axes contributing actively to create a dynamic of disempowerment.[34]

30. An intersectional approach is especially important where citizenship and immigration status are concerned. Individuals and groups who are actual or perceived "foreigners" are vulnerable to a broad spectrum of human rights violations on account of this foreigner status. Foreignness, here, is the status of being an actual or perceived outsider to a given political community and significantly, the construction of foreignness rests on multiple, intersecting classifications, even where international migrants are concerned.[35] For migrants, the relevant membership unit is typically, although not exclusively, the nation State. However, foreignness should not be reduced to nationality or national origin alone.[36] In much of the world, non-white migrants are far more vulnerable to discrimination and intolerance than white migrants, irrespective of nationality. Refugees and migrants are targeted for discrimination on the basis of their nationality and national origin combined with other social categories, the most important of which include race, ethnicity, religion and class.[37] Increasingly these dimensions are made explicit in actual or aspirational State policy, as when politicians in Western Europe and North America openly oppose admission of specific groups of refugees on religious or racial grounds.

1. Gender

31. Gender-based discrimination concerning the right to nationality is explicitly prohibited under article 9 of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Nationality of Married Women.[38]

32. In the context of citizenship, nationality and immigration law and policy, States rely heavily on patriarchal laws and gender-based discrimination to achieve racial, ethnic and religious exclusion or restrictions. In several countries all around the world, women are denied the ability to confer their nationality on their children or on a non-national spouse.[39] This gender-based discrimination is often deployed by States to preserve notions of national, ethnic or racial "purity". An implicit aim of restricting the rights of citizenship to the children of male nationals and excluding married women from transferring their nationality to a foreign spouse is to discourage female nationals from marrying members of particular national, religious, ethnic or racial groups.

33. Twenty-five countries have nationality laws that discriminate based on gender, 12 of which are in the Middle East and North Africa and 6 are in Sub-Saharan Africa.[40] The Working Group on the issue of discrimination against women in law and in practice has highlighted the far-reaching impact of gender discrimination in nationality laws:

> In addition to violating anti-discrimination obligations, the unequal treatment of women's nationality in law and practice hinders the realization of other rights,

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[34] See Division for the Advancement of Women, OHCHR and United Nations Development Fund for Women, "Gender and racial discrimination: report of the Expert Group Meeting, 21–24 November 2000". Available at www.un.org/womenwatch/daw/csw/genrac/report.htm.

[35] For an analysis of foreignness as an intersectional category and its regulatory implications, see E. Tendayi Achiume, "Beyond prejudice: structural xenophobic discrimination against refugees", *Georgetown Journal of International Law*, vol. 45, No. 2 (Winter 2014), pp. 331–334.

[36] National origin and nationality differ in important respects, notwithstanding the regular overlap of the two. National origin variously refers to country of origin or one's ancestry, but nationality refers to the legal status belonging to a given nation State.

[37] See UNHCR, "Combating racism, racial discrimination, xenophobia and related intolerance through a strategic approach", December 2009, para. 11. Available at www.refworld.org/docid/4b30931d2.html.

[38] See also Human Rights Council resolution 32/7; Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women, para. 25.

[39] UNHCR, "Background note on gender equality, nationality laws and statelessness 2017", pp. 3–5. Available at www.refworld.org/docid/58aff4d94.html.

[40] Ibid., p. 2. For analysis of gender discrimination in citizenship laws in Africa, see Bronwen Manby, *Citizenship Laws in Africa: A Comparative Study*, 2nd ed. (New York, African Minds, 2009), pp. 63–72.

including: the right to a nationality and freedom from statelessness, the right to equality in the family, the ability to participate equally in public and political life, freedom of movement, access to public services and the rights to housing, health and education, among other economic, social and cultural rights.[41]

34. In addition, more than 40 countries in the Middle East, North Africa and the sub-Saharan region, as well as in the Caribbean[42] and Asia and the Pacific,[43] have laws denying or implementing restrictions on married women passing their nationality to a foreign spouse on an equal basis with a married man. For example, in some States a woman loses her nationality of origin upon marrying a foreign spouse and cannot regain that nationality if the marriage ends.[44] Owing to citizenship discrimination, women and their children are often left stateless, lack access to social benefits and education, and have limited access to economic opportunities, among many other consequences.[45] Several countries holding discriminatory nationality laws towards women are also home to thousands of refugees who have fled armed conflict, repression, poverty and violence. These laws reinforce the vulnerability of refugee populations to statelessness and to abuse and exploitation.

35. As a result of gender-based discriminatory laws, millions of people are left without access to citizenship and are denied rights they would hold as citizens. In many cases, these gender discriminatory laws have a greater impact on people belonging to specific groups due to their origins, race, ethnicity or descent. These laws may therefore have direct or indirect racial discriminatory impacts on these groups. Indeed, the Working Group on the issue of discrimination against women in law and in practice has found that there is an intersectional dimension to gender-based discrimination in this context that appreciably subjects "women and girls belonging to minority communities, rural and indigenous women, migrant women, refugee women and those seeking asylum, and poor women" to unequal treatment in citizenship and immigration laws.[46] At least one submission received by the Special Rapporteur highlighted the specific challenges faced by transgender non-citizens, including restrictions on these groups that do not apply to citizens, but which have an impact on transgender non-citizens' access to employment, housing and other basic rights and that disproportionately target racial minorities.[47]

36. In recent years, many States have undertaken initiatives to amend their discriminatory nationality laws, allowing women to pass their nationality to their children, and to a lesser extent to their foreign husband.[48] Such reforms are commendable and should be emulated by other States. These reforms were also realizable in countries where Governments withdrew their reservations to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, which provides that States shall grant women equal rights with men to acquire, change or retain their nationality, and also with respect to their children's nationality.

2. Religion

37. Contemporary manifestations of racism and xenophobia where citizenship and immigration status are implicated also point to the importance of attention to religion[49] and its regular overlap with race, ethnicity and national origin where discrimination and

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[41] See www.ohchr.org/Documents/Issues/Women/WG/DiscriminationAgainstWomenNationality.pdf, p. 1.

[42] A/HRC/28/85, p. 119 (BHS 2/2014).

[43] Equality Now, *The State We're In: Ending Sexism in Nationality Laws*, January 2016, p. 16. Available at www.equalitynow.org/sites/default/files/NationalityReport_EN.pdf.

[44] Ibid.

[45] Ibid., p. 9.

[46] See www.ohchr.org/Documents/Issues/Women/WG/DiscriminationAgainstWomenNationality.pdf, p. 2.

[47] See the submission dated 16 February 2018 from Center for Research-Action on Race Relations for the present report.

[48] See Equality Now, "Nationality laws: progress". Available at www.equalitynow.org/nationality-laws-progress.

[49] See A/72/365, paras. 19–25.

intolerance are concerned. The relationship between racial and religious discrimination is complex. Racial and religious discrimination are not always easy to distinguish, especially in practice. For example, religious minorities may also be racially or ethnically distinct in ways that make them vulnerable to racial discrimination that is formally achieved through religious preferences. Furthermore, in some cases religion and race become fused in dangerous ways. In many parts of the world, individuals or groups are discriminated against because they are "Muslim-looking" irrespective of whether these individuals or groups even hold Islamic religious beliefs.[50] On the other hand, the citizenship laws of some countries discriminate against non-Muslims and non-Arabs.[51] While the International Convention on the Elimination of All Forms of Racial Discrimination does not mention religion as a basis for prohibited racial discrimination, the Committee on the Elimination of Racial Discrimination has found that article 1 may apply to cases involving religious discrimination where the targeted individual or individuals belong to identifiable ethnic minority groups.[52]

IV. Contemporary drivers and manifestations of racial discrimination in citizenship, nationality and immigration laws, policies and practices

38. When States justify, adopt and implement policies that racially discriminate on the basis of citizenship and immigration status, they do so using a combination of approaches. It can be difficult to isolate individual drivers of discrimination and intolerance but it is possible to identify distinct, although related, categories.

A. Ethno-nationalism

39. The most obvious driver and facilitator of racial discrimination in citizenship and immigration laws is explicit prejudice, often rooted in ethno-nationalist ideologies. Ethno-nationalism, broadly defined, views the nation as "defined in terms of assumed blood ties and ethnicity".[53] It is important to highlight that, despite popular perception, ethno-nationalist ideologies are not spontaneous. They are the result of a range of complex economic, political, social and historical forces combined with the deliberate manipulation by "ethnic entrepreneurs"[54] and other political actors who seek to advance the narrow interests of particular groups.

40. Ethno-nationalism is not new. As discussed below, it has deep historical roots that have long operated in the realm of the law and policies of political membership. For example, European colonialism relied on ethno-nationalist theories to systemically exclude non-Europeans from effective citizenship status. In the nineteenth and twentieth centuries, Jews and Roma in Europe were targeted and excluded from citizenship on ethno-nationalist grounds. However, shifts have occurred over the past four years that include remarkable and

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[50] Muneer I. Ahmad, "A rage shared by law: post-September 11 racial violence as crimes of passion", *California Law Review*, vol. 92, No. 5 (October 2004), p. 1278; Stephanie E. Berry, "Bringing Muslim minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—square peg in a round hole?", *Human Rights Law Review*, vol. 11, No. 3 (September 2011), p. 446; Olivier Roy, *Globalized Islam: The Search for a New Ummah* (New York, Columbia University Press, 2004), p. 133.

[51] Bronwen Manby, *Citizenship Law in Africa*, p. 4. Available at www.unhcr.org/4cbc60ce6.pdf.

[52] For an analysis of the jurisprudence of the Committee on the Elimination of Racial Discrimination involving religious discrimination that reaches this conclusion, see Stephanie E. Berry, "Bringing Muslim minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—square peg in a round hole?", *Human Rights Law Review*, vol. 11, No. 3 (September 2011), pp. 431–436 and 450.

[53] René Lemarchand, "The siren song of self-determination", *UNESCO Courier* (June 1993), p. 30. Available at http://unesdoc.unesco.org/images/0009/000944/094420eo.pdf.

[54] Ibid., p. 31. See also Kris Brown and Fionnuala Ní Aoláin, "Through the looking glass: transitional justice futures through the lens of nationalism, feminism and transformative change", *International Journal of Transitional Justice*, vol. 9, No. 1 (March 2015), p. 140.

dangerous normalization and mainstreaming of racist and xenophobic discourse in public discourse, in part due to the growth and spread of ethno-nationalist ideologies. Political parties and leaders have shown increasing and disturbing tolerance for ethno-nationalist messages of hatred and intolerance in their political platforms. Countries that have long celebrated immigration as central to their national identity have now taken steps to vilify and undermine immigration, with a disproportionate effect on certain racial, religious and national groups. Even countries such as Argentina, which have been celebrated by holders of this mandate in the past for their human rights-based immigration policies, are now rolling back these policies under anti-immigrant political leadership.[55]

41. The rise of populist nationalism and right-wing extremism has delivered a devastating blow to racial equality, especially in the global North. Non-citizens, including refugees and stateless persons, have been the most vulnerable as a result of the ethno-nationalism that has accompanied this rise, although others have been targets, including women, sexual minorities and people with disabilities. Racist and xenophobic speech and violence against racial and other minorities, and against refugees and migrants in particular, escalated in the wake of the decision by the United Kingdom to leave the European Union, or "Brexit", and national elections in Europe, North America and Australia.[56] At the same time, States and politicians have used offensive and Islamophobic rhetoric to justify blanket immigration bans and military force and fences at border crossings in violation of their obligations under international human rights law and international refugee law. In other countries, the primary targets of blanket immigration prohibitions have been Africans and people of African descent.[57] Reputable reports have uncovered the underhanded tactics of ethno-nationalist political leaders and even official government leaders who have been willing to spend millions deliberately to spread "fake news" or false information about refugees and involuntary migrants.[58] These lies are dangerous and even fatal when they raise national resistance to and violence against asylum seekers and migrants, and more generally escalate racial, ethnic and religious intolerance.[59]

42. Present day Europe offers a multitude of examples of national identity anxiety ranging from explicitly articulated calls for racial or ethnic purity, to coded calls for religious or linguistic preservation. In some cases, ethno-nationalist arguments are pretextually framed as defences of linguistic, cultural or religious identity. But when linguistic and cultural requirements in naturalization or immigration laws have the effect of excluding groups from the benefits of the State on the basis of their race, ethnicity or religion, these requirements should be seen as an urgent and unlawful threat to racial equality. The Special Rapporteur expresses grave concern about the growing number of States that have threatened and even adopted blanket bans against refugees of particular religions or national origin, most commonly Muslims and Muslim majority countries.[60] Religious discrimination blatantly

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[55] See A/HRC/35/41/Add.1. A 2017 presidential decree took the regressive step of overturning or undermining one of the most progressive immigration policies in the world, in an atmosphere of growing racism and xenophobia against non-nationals. See Alejandro Grimson, "Argentina's anti-immigrant about-face", *North American Congress on Latin America Report on the Americas*, vol. 49, No. 2 (2017), p. 123. Available at www.tandfonline.com/doi/abs/10.1080/10714839.2017.1331792.

[56] See, for example, A/HRC/35/41/Add.2, para. 56; A/HRC/35/42, paras. 17–18; A/72/287, paras. 11–17; A/HRC/32/50, paras. 64–65.

[57] See OHCHR, "Israel: UN experts urge immediate halt of plans to deport Eritrean and Sudanese nationals", 1 March 2018. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22741&LangID=E.

[58] See Human Rights Watch, "Hungary's xenophobic anti-migrant campaign", 13 September 2016. Available at www.hrw.org/news/2016/09/13/hungarys-xenophobic-anti-migrant-campaign.

[59] See OHCHR, "Hungary: opinion editorial by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein", 6 March 2018. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22765.

[60] In the case of *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 269 (2018), the United States Court of Appeals for the Fourth Circuit noted that "plaintiffs offer undisputed evidence that the President of the United States has openly and often expressed his desire to ban those of Islamic faith from entering the United States. The Proclamation [travel ban] is thus not only a likely Establishment Clause violation, but also strikes at the basic notion that the government may not act based on 'religious animosity'" (p. 52). See also Secretary General of the Council of Europe, "No

violates international refugee law,[61] and national origin discrimination blatantly violates the international human rights laws and principles analysed above. In the light of the contemporary prevalence of national identity anxiety targeting Muslims, it is important to highlight that the substantive core of such anxiety is often Islamophobia, defined by one legal scholar as "the presumption that Islam is inherently violent, alien, and inassimilable".[62]

43. Blanket exclusion of entire categories of minorities or migrants justified by claims of cultural preservation too often aims to achieve racial preservation. The use of culture in this way has historical roots in Europe and North America. In Europe, traditionally, racism was understood as "an ideology that claims the fundamental inequality and hierarchical order of different biologically defined races".[63] In the wake of German Nazism, scholars in Europe identify the shift in salience from racism traditionally defined to "a new form of racism … not based on biology and hierarchies but on culture and difference".[64] Today, radical right-wing parties in Europe are characterized by ideology that constructs cultural difference as an existential threat to European nationhood that can be neutralized only by migrant exclusion to achieve ethnic purity.[65] A similar dynamic exists in parts of North America, where arguments for national identity preservation have sought to achieve racialized ethnic purity.[66] Culturally coded racism is still racism, and must be strongly condemned.

44. The Special Rapporteur notes that the resurgent xenophobic and racist rhetoric and policies rooted in ethno-nationalism do not only harm non-citizens of any given nation. They also make formal citizens who are ethnic, racial or religious minorities vulnerable to discrimination and intolerance. For example, Islamophobic or anti-Semitic ethno-nationalism undermines the rights of Muslims or Jews irrespective of citizenship status. Ethno-nationalist rhetoric and policy have also reinforced and escalated discrimination against indigenous peoples and peoples of African descent through various measures relating to citizenship and immigration status, even when these communities have deep and enduring ties to the nations in which they reside.[67]

45. In the global South, nation-building and nationalist ideology privileging certain racial, ethnic or religious groups have played an equivalent role to extreme right-wing ideology in the global North. Ethno-nationalist ideologues continue to use civilian and military force to exclude minorities and indigenous peoples from the benefits of national membership. Such forms of intolerance fuel extreme forms of discrimination, including ethnic cleansing and ultimately genocide. The case of Rohingya Muslims offers a chilling example. In this regard, in March 2018, the Special Adviser on the Prevention of Genocide stated that:

> Rohingya Muslims have been killed, tortured, raped, burned alive and humiliated, solely because of who they are. All the information I have received indicates that the intent of the perpetrators was to cleanse northern Rakhine state of their existence, possibly even to destroy the Rohingya as such, which, if proven, would constitute the crime of genocide.[68]

46. The 1982 Myanmar nationality law discriminates on the basis of ethnicity, and is largely inaccessible to the Rohingya, rendering many of them stateless. The law and the way

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place for discrimination, xenophobia in migrant crisis in Europe", 20 August 2015. Available at https://goo.gl/sk8VtS; CCPR/C/POL/CO/7. paras. 31–32.

[61] See Convention relating to the Status of Refugees, art. 3.

[62] See Khaled A. Beydoun, "Islamophobia: toward a legal definition and framework", *Columbia Law Review Online*, vol. 116 (2016).

[63] Jens Rydgren, "Meso-level reasons for racism and xenophobia", *European Journal of Social Theory*, vol. 6, No. 1 (2003), p. 48.

[64] Ibid.

[65] Jens Rydgren, "Immigration sceptics, xenophobes or racists? Radical right-wing voting in six West European countries", *European Journal of Political Research*, vol. 47, No. 6 (October 2008), pp. 745–746.

[66] See, for example, Juan F. Perea, "Demography and distrust: an essay on American language, cultural pluralism, and official English", *Minnesota Law Review*, vol. 77 (1992).

[67] See, for example, CERD/C/GBR/CO/21-23, para. 15; A/HRC/35/41, paras. 48–59.

[68] See www.un.org/sg/en/content/sg/note-correspondents/2018-03-12/note-correspondents-statement-adama-dieng-united-nations.

it is implemented effectively deny nationality to the Rohingya and perhaps more significantly the laws have enabled the State to deny the Rohingya their humanity.[69]

47. Ethno-nationalist ideologies may in some cases be implicitly manifested in legal and policy frameworks that systematically exclude specific racial, ethnic or national minorities from citizenship status, even where these minorities have been territorially resident for multiple generations. The treatment of Haitian descendants, many of whom the Dominican Republic effectively stripped of citizenship,[70] and whom the United States has stripped of temporary protected immigration status,[71] is a clear example of racial targeting. The Inter-American Court of Human Rights found that the Dominican Republic had applied its nationality laws in a discriminatory manner where Dominicans of Haitian descent were concerned.[72] In the report of their 2007 mission to the Dominican Republic, the Special Rapporteur on racism and the independent expert on minority issues found that individuals of Haitian descent were treated in a discriminatory manner in the registration offices of the government agency responsible for issuing important identity documents required to establish citizenship and the right to remain in the country.[73] Although many in the Dominican Republic do not have proper documents, only those with "dark skins and Haitian features" are treated as "illegal".[74] The widespread, institutionalized exclusion of Haitians and Haitian descendants in different parts of the world is but one example of the persisting vulnerability of Afrodescendants to racial discrimination.

48. In some African countries, ethno-nationalist theories of citizenship have been used to disqualify political opposition leaders from national office, and in some parts of Asia and the Middle East, ethno-nationalism regularly results in the stripping of citizenship or territorial expulsion of unpopular racial and ethnic minorities.[75]

Unresolved historical ethno-nationalist legacies

49. In addition to the contemporary manifestations of racial discrimination driven by explicit and implicit ethno-nationalism in the context of citizenship and immigration status, historical legacies remain operational. Especially in former colonial territories, long-standing citizenship and nationality laws often discriminate against indigenous peoples or persons belonging to racial and ethnic minorities, in ways that reinforce ethno-nationalist conceptions of political membership. In some cases, racial or ethnic discrimination in access to citizenship or naturalization renders these groups stateless, preventing them from fully enjoying their human rights.

50. Koreans forcibly transferred to Japan during the Second World War faced extreme forms of discrimination. Today their descendants, despite being second and third generation in that country, are unable to attain citizenship and are still labelled as "foreigners" or "aliens". Additionally, these Korean descendants remain vulnerable to hate crimes, including fatal attacks.[76] Similarly, Nubians living in Kenya are considered to be aliens and have always

[69] See UNHCR, "States of denial: a review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh", December 2011, paras. 11–15. Available at www.unhcr.org/afr/research/evalreports/4ee754c19/states-denial-review-unhcrs-response-protracted-situation-stateless-rohingya.html.

[70] See Inter-American Commission on Human Rights, *Report on the situation of human rights in the Dominican Republic*, 31 December 2015, paras. 4–6 and 197–271. Available at www.oas.org/en/iachr/reports/pdfs/dominicanrepublic-2015.pdf; CERD/C/DOM/CO/13-14, paras. 19–21; A/HRC/7/19/Add.5-A/HRC/7/23/Add.3, paras. 51–87 and 125–131; Inter-American Court of Human Rights, *Yean and Bosico v. Dominican Republic*.

[71] See United States of America, Citizenship and Immigration Services, "Termination of the designation of Haiti for temporary protected status" (Federal Register, 18 January 2018). Available at www.federalregister.gov/documents/2018/01/18/2018-00886/termination-of-the-designation-of-haiti-for-temporary-protected-status.

[72] See Inter-American Court of Human Rights, *Yean and Bosico v. Dominican Republic*, para. 260.

[73] See A/HRC/7/19/Add.5-A/HRC/7/23/Add.3, paras. 49, 55–56 and 129.

[74] Ibid., para. 62.

[75] James A. Goldston, "Holes in the rights framework: racial discrimination, citizenship, and the rights of noncitizens", *Ethics and International Affairs*, vol. 30, No. 3 (2006), p. 327.

[76] See CERD/C/JPN/CO/7-9, para. 11.

occupied an uncertain citizenship status.[77] British colonial forces conscripted many Nubians in the Sudan and deployed them to Kenya during the Second World War. At the end of the war, these Nubians were prohibited from repatriation and the colonial Government refused to acknowledge Nubians as citizens, instead classifying them as a foreign tribe.[78] This foreigner classification has continued to define Nubians in Kenya, despite many generations of Nubians living in Kenya, with no real ties to the Sudan.[79] To obtain the identity cards necessary to prove citizenship, Nubians must undergo long, complex and humiliating vetting processes without the guarantee they will be issued with the cards.[80] This process effectively restricts Nubians from accessing citizenship at all in parts of East Africa. It was only in June 2017 that Kenya recognized the property rights of Nubians, following a decision of the African Commission on Human and Peoples' Rights.[81]

51. The Special Rapporteur notes with concern that the restrictive nationality laws in one State in the Middle East have left more than 100,000 people stateless. Although many of them have lived in the country for generations, they are considered "illegal residents" who continue to be denied equal access to social services, legally valid civil documentation, and due process in claiming citizenship.[82]

52. In some countries, former citizens of predecessor States continue to face barriers to the regularization of their status. According to UNHCR, there were more than 722,000 stateless persons with no or unclear citizenship status in the Organization for Security and Cooperation in Europe (OSCE) area in 2015. The majority of them are former Soviet Union and Socialist Federal Republic of Yugoslavia citizens.[83] While many successor States have adopted measures to regularize the status of former citizens of predecessor States who now reside within their jurisdictions, to this day, thousands of people in successor States do not enjoy the rights and benefits of citizenship.[84] Although citizenship regulations in these countries do not formally discriminate against particular groups of non-citizens, historical circumstances often mean that persons belonging to ethnic minorities are disproportionately affected.[85] In Latvia, more than 230,000 people remain so-called non-citizens, 99.5 per cent of whom belong to ethnic minorities.[86] In this context, a former Special Rapporteur on racism

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[77] See CERD/C/KEN/CO/5-7, para. 27.

[78] Bronwen Manby, *Struggles for Citizenship in Africa* (New York, Palgrave Macmillan, 2013), pp. 122–123.

[79] Samantha Balaton-Chrimes, "Indigeneity and Kenya's Nubians: Seeking equality in difference or sameness?", *Journal of Modern African Studies*, vol. 51, No. 2 (June 2013), pp. 338–339. Available at www.cambridge.org/core/services/aop-cambridge-core/content/view/S0022278X13000049. See also Adam Hussein Adam, "Kenyan Nubians: standing up to statelessness", *Forced Migration Review*, vol. 32 (April 2009). Available at www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR32/19-20.pdf; African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v. Kenya*, decision No. 002/Com/002/2009 (2011). Available at www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf (finding that the treatment of children of Nubian descent in Kenya by the Government constituted a violation of the African Charter on the Rights and Welfare of the Child and a failure to protect their right to nationality).

[80] See Open Society Foundations, "Nubian community in Kenya v. Kenya", 12 May 2017. Available at www.opensocietyfoundations.org/litigation/nubian-community-kenya-v-kenya.

[81] See Open Society Foundations, "After long struggle, Kenya's Nubian minority secures land rights", 5 June 2017. Available at www.opensocietyfoundations.org/press-releases/after-long-struggle-kenyas-nubian-minority-secures-land-rights.

[82] See CERD/C/KWT/CO/21-24, paras. 27–28; CCPR/C/KWT/CO/3, paras. 10–11; Human Rights Watch, "Prisoners of the past: Kuwaiti Bidun and the burden of statelessness", 13 June 2011. Available at www.hrw.org/report/2011/06/13/prisoners-past/kuwaiti-bidun-and-burden-statelessness.

[83] OSCE and UNCHR, "Handbook on statelessness in the OSCE area: international standards and good practices", 2017, p. 9. Available at www.osce.org/handbook/statelessness-in-the-OSCE-area.

[84] Ibid.

[85] See, for example, A/HRC/7/19/Add.3, para. 77.

[86] See www.pmlp.gov.lv/lv/assets/documents/1aaaa/ISVN_Latvija_pec_TTB_VPD.pdf.

recommended that the country adopt various measures to facilitate naturalization, including granting automatic citizenship at birth to children of non-citizen parents.[87]

53. The Special Rapporteur highlights that long-standing barriers in access to citizenship and naturalization in various countries have contributed to the deep-rooted forms of discrimination and exclusion faced by Sinti and Roma. Many members of the Roma and Sinti communities are stateless or face the risk of statelessness due to their lack of access to civil registration and identity documents.[88] Some of the major factors contributing to the lack of personal documents include complicated and burdensome bureaucratic procedures, lack of financial means to pay for the process of obtaining documentation, residence in unregistered settlements and difficulties in registering permanent place of residence, displacement, lack of access to free legal aid, lack of information about the procedures and discrimination.[89] These barriers mean that statelessness is passed on from generation to generation, further perpetuating the exclusion, discrimination and marginalization that Roma and Sinti communities experience in many countries.

54. At the same time, racial discrimination in the context of citizenship and immigration law and practice is often fuelled by national concerns and resulting policies that exist outside the realm of ethno-nationalism. An important example is national anxieties about national security and economic prosperity, which continue to facilitate racial discrimination on the basis of citizenship and immigration status. In the remainder of this section, the Special Rapporteur analyses these anxieties as contributing to racial discrimination and xenophobia, and condemns the role they play in perpetuating discrimination and intolerance on the basis of race, colour, descent, ethnicity, national origin or religion.

B. National security machinery and anxiety

55. Especially in Western liberal democracies, anxieties about national security and terrorism threats have produced a far-reaching web of surveillance and other practices that result in racial discrimination on the basis of citizenship or immigration status. This trend continues the disturbing and unlawful practices extensively documented by the former Special Rapporteur in his 2017 thematic reports. In these reports, he provides a comprehensive analysis of the human rights violations and xenophobic rhetoric abetted by Governments and other actors in Europe, Asia, South America, the Middle East, North America and Africa, fuelled by exaggerated and manipulated terrorism and national security anxieties, especially targeting Muslims and those perceived to be Muslim.[90]

56. In some countries, politicians have spread misinformation that portrays certain racial, national and religious groups as inherent national security threats. These misinformation campaigns have been most vehemently propagated by political parties and leaders with ethno-nationalist commitments. These parties and leaders deliberately stoke and exploit the national security anxieties of national populations, and they effectively stigmatize entire racial, ethnic, national and religious groups in ways that make these groups even more vulnerable to racist and xenophobic violence.[91]

57. States all over the world continue to use national security and counter-terrorism justifications to strip members of their national populations of citizenship. Rarely do States explicitly discriminate on the basis of race, ethnicity or national origin in their citizenship-stripping processes. However, overbroad policies ostensibly rooted in national security concerns permit arbitrary enforcement — including arbitrary citizenship stripping — which in practice have a disproportionate effect on marginalized racial, national and religious

[87] See A/HRC/7/19/Add.3, para. 88.

[88] See A/HRC/29/24, para. 36.

[89] OSCE, Office for Democratic Institutions and Human Rights, "Summary report: expert seminar on access to identification and civil registration documents by Roma in Ukraine" (Kyiv, 2015), p. 6. Available at www.osce.org/odihr/211996?download=true.

[90] See A/HRC/35/41, paras. 48–75; A/72/287, paras. 11–45.

[91] See OHCHR, "Zeid warns against populists and demagogues in Europe and U.S.", 5 September 2016. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20452.

groups. In these cases, racial discrimination continues to be the foreseeable effect of overbroad national security policy that is not proportionately tailored to achieve legitimate national defence requirements.

58. Whereas some groups are at heightened risk of losing citizenship and immigration status due to national security machinery and anxiety, these groups are also systematically barred from naturalization or regularizing their immigration status for similar reasons. A disturbing example is the application of clandestine reviews and internal checks that use unreliable methods to designate persons belonging to specific religious ethnic groups as inherent national security threats, thereby barring or delaying their naturalization.[92]

59. For a detailed analysis of the racial discrimination and intolerance targeting non-nationals and driven by national security and terrorism fears, the Special Rapporteur refers the Council to the 2017 reports of her predecessor, which also canvass the applicable international human rights law.[93]

C. Economic scapegoating of non-citizens

60. The economic effects of globalization have included escalating inequality. The continuing impact of the 2008 global financial crisis, for example, includes austerity measures that have impoverished many around the globe. Previous holders of this mandate have highlighted "the direct relationship between the increase in economic disparity and the increase in xenophobic and populist parties".[94] The resulting economic marginalization of large sectors of national populations continues to facilitate toxic scapegoating, in which migrants, refugees and other non-nationals bear the blame for the economic failures of Governments and the global neoliberal order. To make matters worse, opportunistic political leaders and extremist groups continue to use economic fears to justify punishing restrictions on the human rights of migrants. The Government of Israel, for example, has vowed to expel refugees and migrants whom it has labelled "infiltrators", "economic opportunists" and "criminals".[95] In Greece, refugees from so-called "undesirable" countries in North Africa and South Asia are being singled out, detained and put through fast-track asylum procedures before being returned to Turkey.[96]

61. The Special Rapporteur wishes to highlight that, especially with respect to refugees, the countries and Governments that have had the most racist and xenophobic responses to involuntary displacement in Europe, North America and Australasia in particular are not the countries that currently shoulder the primary economic implications of refugee admissions. In 2016, UNHCR reported that 84 per cent of the world's refugees under the UNHCR

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[92] For example, the American Civil Liberties Union has argued that the United States Controlled Application Review and Resolution Program uses unreliable methods of determining national security threats and often equates the practice of Islam and Muslim religious observance with terrorism. See Jennie Pasquarella, *Muslims Need Not Apply* (American Civil Liberties Union of Southern California, August 2013). Available at www.aclusocal.org/sites/default/files/carrp-muslims-need-not-apply-aclu-socal-report.pdf.

[93] See A/HRC/35/41, paras. 52–96; A/72/287, paras. 11–57.

[94] See A/HRC/35/41, para. 48.

[95] See OHCHR, "Israel: UN experts urge immediate halt of plans to deport Eritrean and Sudanese nationals", 1 March 2018. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22741&LangID=E. See also Ruth Eglash and Loveday Morris, "Q&A with Israel's Interior Minister Aryeh Deri: plan to deport thousands of Africans is not about race", *Washington Post*, 7 February 2018. Available at www.washingtonpost.com/news/worldviews/wp/2018/02/07/refugees-or-illegal-migrants-israels-plan-is-to-deport-them-by-force/?utm_term=.5d917cd434f8; A/HRC/22/67 and Corrs.1 and 2, p. 24 (ISR 8/2012).

[96] See Eleni Koutsaraki, "The indefinite detention of undesirable and unreturnable third-country nationals in Greece", *Refugee Survey Quarterly*, vol. 36, No. 1 (March 2017); Amnesty International, "Greece: lives on hold. Update on situation of refugees and migrants on the Greek islands", 14 July 2017. Available at www.amnesty.org/download/Documents/EUR2567452017ENGLISH.PDF.

mandate were being hosted in developing countries,[97] with some of the poorest and least xenophobic countries playing host to the largest numbers of refugees. Economic rhetoric used to justify refugee exclusion in wealthy countries should be rejected for the xenophobia and racism that is at its core. The Special Rapporteur on the human rights of migrants has noted that, notwithstanding the prevalence of narratives portraying migrants generally as an economic strain, "immigration has ... been found to have a minimal impact on unemployment of residents and a positive overall impact on employment generation and investment".[98]

62. In the Durban Declaration, States acknowledge the unequal distribution of the benefits of globalization and recognize "that interregional and intraregional migration has increased as a result of globalization, in particular from the South to the North" (paras. 11–12). They go on to stress that migration policies should not be based on racism, racial discrimination, xenophobia and related intolerance (para. 12). Yet still, racists and xenophobes — including in Governments all over the world — continue to take advantage of legitimate economic discontent to target non-nationals of specific racial, ethnic and religious groupings. Opportunistic political leaders and parties continue to strategically deploy inaccurate economic narratives about non-nationals of specific ethnicities, races and religions. In doing so, these leaders and parties distract national attention from political and economic elites among citizens, including through multinational corporations, all of whom are the persistent overrepresented beneficiaries of economic globalization.

V. Conclusion and recommendations

63. **In sum, racist and xenophobic ideologies rooted in ethno-nationalism regularly combine with national security fears and economic anxieties to violate the human rights of non-citizens, indigenous peoples and minorities on the basis of race, ethnicity, national origin and religion. Although the Special Rapporteur analyses each of the drivers separately in the present report, it is vital to maintain sight of their combined operation. The resurgence and spread of extreme right-wing racist ideology should be challenged alongside other discourses and drivers that are on their face more acceptable, but are in practice just as effective at targeting specific racial, ethnic or religious groups. National security and economic prosperity anxieties or concerns can have the ultimate effect of making racial and xenophobic discrimination and intolerance more socially acceptable. The value of distinguishing the different drivers is the subsequent capacity to develop tailored policies that are responsive to conditions on the ground.**

64. **In a number of recent cases, some courageous States and other actors within the United Nations system have publicly condemned instances of extreme xenophobic ethno-nationalism. These actions are to be encouraged and commended. However, in most instances of explicit ethno-nationalism, xenophobia and racism, even at the highest levels of political office, too many States remain silent. This silence amounts to complicity and the Special Rapporteur urges all States and multilateral regional bodies to take public, consistent and firm positions against all such incidents whenever they occur.**

65. **The Special Rapporteur urges all to be vigilant regarding the calculated and opportunistic ways in which many political leaders and parties continue to exploit the economic discontent and national security anxieties of their populations. States must refrain from pretextual use of exaggerated economic and national security concerns that are not grounded in objective reality in order to justify racist and xenophobic practices in the context of citizenship, nationality and immigration laws and policies. Legitimate economic and national security concerns will not be resolved by allowing populist but elite leaders who are already overrepresented beneficiaries of economic**

[97] UNCHR, *Global Trends: Forced Displacement in 2016*, p. 2. Available at http://www.unhcr.org/5943e8a34.pdf.

[98] See A/69/302, paras. 20, 25 and 98.

globalization instrumentally to use and further marginalize those who have not benefited in the same ways from the global neoliberal order.

66. In the light of these conclusions, the Special Rapporteur wishes to reiterate the recommendations made by the Committee on the Elimination of Racial Discrimination in its general recommendation No. 30 on discrimination against non-citizens (sects. II–VII). She also recalls relevant good practices and recommendations made by her predecessors, particularly in reports relating to xenophobia (A/HRC/32/50), counter-terrorism (A/72/287), racial and ethnic profiling (A/HRC/29/46) and Islamophobia (A/HRC/15/53).

67. In addition, the Special Rapporteur urges States to adopt the following concrete measures aimed at eliminating and preventing racial discrimination in the context of citizenship, nationality and immigration:

(a) Ratify relevant instruments, including the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and harmonize the definitions of racial discrimination against non-citizens, stateless persons and refugees within national laws in accordance with these instruments. This includes withdrawing reservations to these treaties that undermine the pursuit of substantive racial equality;

(b) Especially with respect to citizenship and nationality, adopt and implement article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, as explained by the Committee on the Elimination of Racial Discrimination in its general recommendation No. 30. States are prohibited from restricting the rights of non-citizens in any way that is not proportionately tailored to achieve a legitimate aim grounded in the substantive racial equality framework of the Convention. Under the Convention relating to the Status of Refugees and the International Convention on the Elimination of All Forms of Racial Discrimination, blanket bans on specific nationalities and other immigration measures that exclude on the basis of race, colour, ethnicity or national origin are unlawful. States must take immediate steps to undo any measures of this sort;

(c) Take specific steps to end statelessness, including by putting an end to the practices and policies identified above that render persons stateless and in doing so, make them vulnerable to extreme human rights violations;

(d) Address intersectional discrimination, especially as it affects non-citizens on the basis of gender and religion, combined with other grounds;

(e) Make every effort to ensure that the Global Compact on Migration and the Global Compact for Refugees both place equality and non-discrimination principles at their centre. For the Global Compact on Migration, this means States must make an explicit commitment to protecting regular and irregular migrants from racial discrimination, as required by international human rights law.

68. A set of more concrete recommendations has been posted on the website of the Special Rapporteur.[99]

[99] See www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/Reports.aspx.